LO KHI ON (TRADING AS FUJI HAIRDRESSING SALOON)

v.

TANJONG ARU HOTEL SDN. BHD.

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
TUAN IAN H.C. CHIN J.
[SUIT NO. K.663 OF 1985]
2 SEPTEMBER 1994

CONTRACT: Termination of tenancy agreement and repossession of premises - Defendants alleging illegal massage activities carried out in premises to the prejudice of defendants' business licence - Whether any proof of illegal massage activities - Whether defendants' licence prejudiced - Plaintiff claiming damages for wrongful termination - Defendants counterclaiming for damages for breach of agreement - Whether any proof of damages.

PRACTICE & PROCEDURE: Plaintiff claiming damages for alleged wrongful termination of tenancy agreement - Burden of proof - Defendants making all positive assertions - Who to begin case - O. 35 r. 4(2) RHC - Exceptions under O. 35 rr. 4(1) & 4(6) RHC - Election of no case to answer by defendants - Whether sustainable - Notice from Majlis Perbandaran admitted as proof of illegal massage activities - Whether notice to be regarded as proving illegal activities - Standard of proof required - Measure of damages where fact of loss shown but evidence of amount not given - Consideraton of by-law 6 Kota Kinabalu Municipal Council (Hairdressers) By-laws 1966 and by-law 3 Kota Kinabalu Municipal Council (Massage Establishments) By-laws 1979.

On 20 February 1984, the plaintiff entered into an agreement with the defendants whereby the defendants' premises was let to the plaintiff for three years. On 26 October 1984, the plaintiff received a notice from the Majlis Perbandaran Kota Kinabalu to stop the defendants from operating illegal massage activities in their hotel premises. By a letter dated 12 November 1984, the defendants terminated the agreement and on the same day entered the premises and evicted the plaintiff on the basis that the plaintiff had caused illegal massage activities to be carried out in the premises in breach of the agreement. The plaintiff contended the defendants' action was in breach of the agreement. The plaintiff claimed and the defendants counterclaimed for damages.

During the trial the plaintiff's witnesses gave evidence that no limb massages took place in the saloon. The evidence revealed there were cubicles in the premises where the customers were being serviced and it was established that the customers could see one another which was in compliance with by-law 3 of the Kota Kinabalu Municipal Council (Hairdressers) By-laws 1966. Apart from that no evidence was led to establish the special damages claimed nor was evidence led to show the plaintiff had suffered loss and damage. At the close of the plaintiff's case the defendants elected to submit that the plaintiff had failed to make out a case.

Held:

[1] The defendants were making all the positive assertions engendered in the issues which they had to prove whereas the plaintiff had only to prove damages. Who then should begin the case in such a situation? Ordinarily it is the plaintiff who should begin his case pursuant to O. 35 r. 4(2) of the Rules of the High Court 1980 (RHC) but there are exceptions, one of which is O. 35 r. 4(6) and the other is the discretion granted to the Court under O. 35 r. 4(1) to direct who should begin but any defendant seeking to begin

where the case is not one within O. 35 r. 4(6) must satisfy the Court that there is a good reason for doing so. There was no denying that damages, which the plaintiff had to prove, was an issue in this case and thus the defendants did not carry the burden of proof of all the issues which rendered O. 35 r. 4(6) inapplicable. The Court would have exercised its discretion under O. 35 r. 4(1), if Counsel had pressed for it, to allow the defendants to commence its case as this was a suitable case for the defendants to do so for the reason that the plaintiff had nothing to prove except for damages. However, as events turned out, it did not matter because the defendants elected not to adduce evidence at the close of the plaintiff's case.

[2] Clearly, the defendants had to prove they were entitled to terminate the agreement and it was not for the plaintiff to prove that the defendants had unlawfully re-entered the premises. It was admitted that the termination of the agreement was before the expiry date which, in the Court's view was sufficient *prima facie* evidence to establish the plaintiff's case and no evidence had to be adduced to prove the re-entry of the premises and the termination of the agreement by the defendants. The onus was on the defendants to prove the assertions failing which they would fail in their defence save as regards damages. Since no evidence was adduced by the defendants on account of the election and since there was no evidence that illegal massage activities had been carried out, the submission of no case could not be sustained.

[3] The defendants had to prove the truth of the statement in the letter of 26 October 1984 that illegal massage activities were carried on in the premises which had not been done. The letter was far from clear as to the place, whether it was in the rooms of the hotel or in the premises, where the illegal massage activities were alleged to have been carried out. Therefore, assuming what the letter said was true and assuming that the burden of proving that the plaintiff had committed a statutory offence was simply on a balance of probabilities, the evidence fell woefully short of that standard; even more so when there was evidence that room service massage was carried out and the letter could be construed as being directed at the room service massage which activity was not relied on by the defendant for eviction of the plaintiff. Furthermore, assuming that the illegal massage activities had been established, it was a term of the agreement that the activity must also "prejudice any licence held by the defendants in connection with the defendants' business". Counsel did not address the Court on this point nor was there evidence that any of the defendants' licences had been prejudiced.

[4] The plaintiff had established his case on a balance of probabilities because the facts and circumstances of this case justify the inference that the plaintiff had suffered loss. as regards the standard of proof, the Court was of the view that though the ordinary standard of proof on a balance of probabilities applied, the degree of probability must be higher if the allegation is serious. Allegation that an offence under the Kota Kinabalu Municipal Council (Massage Establishments) By-laws 1979 had been committed requires proof of a much higher degree of probability than, say, negligence.

[5] There was no evidence as to the damages suffered. Nominal damages may be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given which was the case here. The Court therefore awarded the plaintiff damages of one ringgit with costs. The defendants' counterclaim was dismissed with costs to the plaintiff.

[Plaintiff's claim allowed with costs. Defendants' counterclaim dismissed with costs to plaintiff].

Cases referred to:
Re the Estate of Parry (decd), Parry v. Fraser [1977] 1 All ER 309 ***(refd)***
KPM Khidmat Sendirian Berhad v. Tay Kim Suie [1994] 3 CLJ 111; [1994] 2 AMR 28:1417 ***(foll)***
Hornal v. Newberger Products Ltd. [1956] 3 All ER 970 ***(refd)***
Eastern Enterprises Ltd. v. Ong Choo Kim [1969] 1 MLJ 236 ***(refd)***
Beaumont v. Greathead [1846] 2 CB 494 ***(refd)***

Legislation referred to:
Kota Kinabalu Muncipal Council (Hairdressers) By-laws 1966, By-law 6
Kota Kinabalu Muncipal Council (Massage Establishments) By-laws 1979, By-law 3(1), (2)
Rules of the High Court 1980, O. 35 rr. 4(1), (2), (6)

Other sources referred to:
McGregor on Damages, 15th Edn., para 399

For the plaintiff - Norbert Chin; M/s. Dr. Yee Tan & Norbert Chin
For the defendants - Peggy Liow; M/s. Jayasuriya Kah & Co.

JUDGMENT

Ian H.C. Chin J:

This action was taken out on 12 July 1985 by the plaintiff Lo Khi On, the sole proprietor of the firm Fuji Hairdressing Saloon ("the plaintiff") against Tanjong Aru Hotel Sdn. Bhd. ("the defendants") for repossession of an area measuring 453 sq. ft. known as Lot No. 2 ("the premises"), situated on the ground floor of Tanjong Aru Beach Hotel, and damages for breach of an agreement. The trial commenced on 29 August 1994 and it ended by the afternoon of of the same day. The undisputed facts and the allegations of the case are as follows.

Facts & Allegations

On 20 February 1984 the plaintiff, entered into an agreement ("the agreement") with the defendant, the owner of the property known as Tanjong Aru Beach Hotel at Tanjong Aru, Kota Kinabalu whereby the defendants let to the plaintiff the premises for a term of three years. Possession of the premises was thereafter given to the plaintiff. On 12 November 1984, the defendants entered the premises and evicted the plaintiff. The plaintiff claims that this action of the defendants is in breach of the agreement. The defendants do not deny the re-entry of the premises but the defendants maintain that the plaintiff, in breach of the agreement, had caused illegal massage activities to be carried out in the premises which entitled them to terminate the agreement which they did by a letter dated 12 November 1984. The defendants counterclaim for damages alleging that it was the plaintiff who was in breach of the agreement. From the pleadings delivered, I am of the opinion that the issues are clearly defined, *viz*:

Issues

(1) Did the plaintiff, in breach of clause 3 of the agreement, cause to be carried out in the premises illegal massage activities;

(2) Did the illegal massage activities, if proven to have taken place and to have been caused by the plaintiffs, prejudice any licence held by the defendants in connection with the defendants' business; and

(3) Did the plaintiff suffer any damages as a result of his eviction from the premises.

The plaintiff's claim for repossession of the premises was not pursued since Mr. Norbert Chin, Counsel for the plaintiff, did not address the Court on the issue and he only

confined himself to the question of damages. Having defined the issues, my next task then was to decide who should begin the case.

Who Should Begin

What is also clear from the pleadings, which I will advert in more detail at a later stage, is that the defendants are making all the positive assertions engendered in the said issues and which they will have to prove. On the part of the plaintiff, they need only prove damages. Who then should begin the case in such a situation? Ordinarily, it is the plaintiff who should begin his case (see O. 35 r. 4(2) of the Rules of the High Court 1980). There are exceptions, one of which is O. 35 r. 4(6) which says:

> Where the burden of proof of all the issues in the action lies on the defendant or, where there are two or more defendants, and they appear separately or are separately represented, on one of the defendants, the defendant or that defendant, as the case may be, shall be entitled to begin, and in that case paragraphs (2), (3) and (4) shall have effect in relation to, and as between him and the plaintiff as if for references to the plaintiff and the defendant there were substituted references to the defendant and the plaintiff respectively.

The other exception is in the discretion granted to the Court under O. 35 r. 4(1) to direct who should begin but any defendant seeking to begin where the case is not one within O. 35 r. 4(6) must satisfy the Court that there is a good reason for doing so (*Re the Estate of Parry (decd,) Parry v. Fraser* [1977] 1 All ER 309). There is no denying that damages, which the plaintiff has to prove, is an issue in our case and thus, the defendants do not carry the burden of proof of all the issues, thereby rendering O. 35 r. 4(6) inapplicable. But the practical difficulty that entails with the plaintiff beginning his case instead of the defendants began to emerge when the witnesses for the plaintiff gave evidence and were cross-examined by Miss Peggy Liow, Counsel for the defendants. The evidence of illegal massage activities, the particulars of which are not specified in the defence (but then again the pleading was not attacked by way of request for further and better particulars), would have to be elicited first before the plaintiff can rebut the evidence. It was at this stage of the proceedings that I prompted Miss Peggy Liow to put the allegations of illegal massage activities to the witnesses of the plaintiff which was not done when the first witness of the plaintiff gave evidence and I wonder whether it would have been done to the other witnesses had it not been for my prompting. I would have exercised my discretion under O. 35 r. 4(1), if Counsel had pressed for it, to allow the defendants to commence its case as I think this is a suitable case for the defendants to do so for the reason that the plaintiffs had nothing to prove except for damages which, for the reason I shall state later when I consider the question of damages, in any event can be inferred without any evidence of damage. If the defendants were to adduce evidence of the illegal massage activities at the defence stage, it would most probably involve the plaintiff having to either recall his witnesses or call additional witnesses to adduce rebuttal evidence resulting in a prolonged and more expensive trial which otherwise would be avoided if the defendants were to begin its case. As the events turn out, it does not matter because the defendants elected not to adduce evidence at the close of the case for the plaintiff. I will now turn to the evidence adduced in this case.

Evidence

The plaintiff called three witnesses, all former employees of the plaintiff and, as expected, they gave evidence that no limb massages took place in the saloon. The bulk of the cross-examinations were directed at the transparency or otherwise of the activities that were carried on in various sections of the saloon. I will digress here to

advert to the relevant subsidiary legislation which were cited by both parties and upon which the defendants rely for its defence and which explain the questions put to the witnesses. The first is the Kota Kinabalu Municipal Council (Hairdressers) By-laws 1966, which governs the trade of hairdressing and provides for the payment of licence fees. One of the fees payable under by-law 6 is worded as follows:

	Per month per seat $
(a) Hairdressing with limb massage ...	90.00

The other bylaw referred to is the Kota Kinabalu Municipal Council (Massage Establishments) By-laws 1979 but only by-law 3 is of relevance and it says:

3. (1) Subject to paragraph (2) no person shall operate a massage establishment without a licence in that behalf issued by the Council under these By-laws.

(2) A hairdresser's premises shall not be required to be licensed under this by-law notwithstanding that facial or scalp massage or manicure treatment to customers is administered in the said premises, so long as the massage or manicure treatment aforesaid is administered in full view of other customers.

The evidence, which I now return to, were mostly elicited by cross-examination. The evidence reveal there were cubicles in the premises where the customers were being serviced. Questions were directed at establishing whether one customer of the saloon can see another to which the witnesses testified in the affirmative. Apart from that, no evidence was led to establish the special damages claimed nor was evidence led to show the plaintiff had suffered loss and damage. The plaintiff closed its case, not unexpectedly because the plaintiff does not carry the burden of proof of the assertions save for damages, upon the very little evidence I had just referred to. I then turned to Miss Peggy Liow to ask her election and she initially indicated that she will call evidence but she changed her mind after the lunch break and elected to submit that the plaintiff had failed to make out a case. This came as a result, I am inclined to believe, of my remark that the plaintiff had not proved damages. Miss Peggy Liow, I am of the view, had wisely chosen this course because it was obvious from the way questions were put to the plaintiff's witnesses that the defendants would not be able to establish that illegal massage activities had been carried out in the premises. This has resulted in a tremendous saving of costs which otherwise would have been incurred if the witnesses were called. As for the submissions in the speeches of both learned Counsel, I will deal with them as I set out my reasons for the decisions I am going to make.

Submission Of No Case & Conclusions

Miss Peggy Liow argued that the plaintiff must prove that the re-entry of the premises by the defendant was unlawful and this, according to Miss Peggy Liow, the plaintiff had failed to do. With all due respect to her, she failed to appreciate the issues which the pleadings had defined and as to whom rests the burden of proving the assertions. I have at the outset already set out the issues which arose as a result of the pleadings. I will first turn to the statement of claim, the relevant paragraphs of which are these:

3. By an agreement in writing made on 20 February 1984 between the defendant of the one part and the plaintiff of the other part, the defendant let to the plaintiff the premises known as Lot No. 2, comprising 453 square feet on the Ground Floor of Tanjong Aru Beach Hotel and situate at Tanjong Aru, Kota Kinabalu, Sabah for a term of three (3) years from 15 January 1984 at a rent of RM3,000 per month. The plaintiff will refer to the said agreement at the trial for the full terms and effects thereof.

4. The said tenancy contained a covenant by the defendant that the plaintiff shall peaceably and quietly hold the said premises during the said term without any interruption by the defendant or any persons lawfully claiming under or in trust for it.

5. The defendant in breach of the said Agreement, on 12 November 1984 wrongfully entered the said premises and evicted the plaintiff and his servants, and further locked up the said premises thereby depriving the plaintiff of the use of the said premises.

6. By reason of the foregoing the defendant is in breach of the covenant for quiet enjoyment referred to in paragraph 4 hereof and further is in breach of the said agreement and as a result the plaintiff has suffered loss and damage.

It is clear from the just quoted paragraphs of the statement of claim that the plaintiff alleges that he had entered into the agreement with the defendants for three years and that before the expiry of the three years the defendants had, in breach of the agreement, re-entered the premises on 12 November 1984, and wrongfully terminated the agreement. When the defence was delivered, apart from admitting the agreement and the tenancy for three years, the defence went on to state as follows:

3. It was a material term of the agreement that the plaintiff shall not, *inter alia*, permit or suffer any part of the said premises to be used for any illegal purposes or permit to be done anything to prejudice any licence held by the defendants in connection with the defendants' business.

4. In breach of the term mentioned in paragraph 3 above, the plaintiff has caused illegal massage activities to be carried out in the said premises.

5. By a letter dated 12 November 1984, the defendants informed the plaintiff about the illegal massage activities being carried out in the said premises and gave notice for the determination of the agreement which they are lawfully entitled to do under the agreement.

6. By reason of the above, the defendants deny that they are in breach of the agreement or that they have wrongfully re-entered the said premises.

The defence, from the paragraphs just quoted, had further admitted re-entry of the premises on 12 November 1984 before the expiry of the agreement. The defendants, as can be gathered from the said paragraphs of the defence, are asserting that they have a right to do so because the plaintiff had carried out illegal massage activities which prejudice the business licence of the defendants and thus entitled them to terminate the agreement. Clearly, the defendants have to prove they were entitled to terminate the agreement and it is not for the plaintiff to prove that the defendants had not lawfully re-entered the premises. It is admitted that the termination of the agreement was before the expiry date; that, in my view is sufficient *prima facie* evidence to establish the plaintiff's case and no evidence need be adduced to prove the re-entry of the premises and the termination of the agreement by the defendants. The onus is on the defendants to prove their said assertions failing which they would fail in their defence save as regards damages. Since no evidence was adduced by the defendants, on account of the election, and since there was no evidence that illegal massage activities had been carried out, the submission of no case cannot be sustained. Miss Peggy Liow had also submitted that the illegal massage activities were proven by the statements contained in the letter (exhibit P6) which has been admitted as evidence. The terms of this letter are as follow:

Majlis Perbandaran Kota Kinabalu
Etc...

26 October 1984

The General Manager,
Tanjong Aru Beach Hotel,
Kota Kinabalu.

Attention: Encik W. Kollman

Tuan,

Illegal Massage Activites - Fuji Hairdressing Saloon

Your attention is drawn to the illegal massage activities carried out by Fuji Hairdressing Saloon within your hotel premises. Such activities are in contravention with the provisions of the Kota Kinabalu Municipal Council (Massage Establishments) By-laws 1979. The Council has also issued a notice to the operator of the saloon for carrying renovation works to the approved plan. Enclosed a photostat copy of the notice for your reference. Our inspection (Kollman/Leong) on 25 October 1984 at 2.30 p.m. confirms what has been said earlier of the illegal massage activities.

2. In order to uphold the good image of your hotel and Sabah in general you are hereby given notice to stop the hairdressing saloon from operating within your hotel premises forthwith.

Yang benar,

[Signed]
b.p. Setiausaha Perbandaran,
Majlis Perbandaran Kota Kinabalu.

Miss Peggy Liow argued that this letter establishes the illegal massage activities of the plaintiff which justified the termination of the agreement. Assuming for the moment that the illegal massage activities had been established, it must not be forgotten that it is a term of the agreement, and this is asserted by the defendants in their defence, that the activity must also be, to quote the words of the pleading of the defendants, "to prejudice any licence held by the defendants in connection with the defendants' business". Miss Peggy Liow did not address the Court on this point and there is no evidence that any of the defendants' licences had been prejudiced. Turning again to the letter, one has to ask whether this letter can be regarded as proof of the illegal massage activities (which the plaintiff had denied in his reply and in the numerous letters produced in Court). I do not think so and support for my view can be found in the following passage in the recent Supreme Court case of *KPM Khidmat Sendirian Berhad v. Tay Kim Suie* [1994] 2 AMR 28:1417 ([1994] 3 CLJ 111 SC) at pp. 1422-1423, *viz*:

> On the question of a balance sheet, the Indian Supreme Court, in *Petlad Turkey Red Dye Works Ltd. v. Dyes & Chemical Workers' Union Petlad & Anor.*[(1)], has held that a balance sheet does not by itself prove the facts stated therein. It has to be proved like any other fact by affidavit or otherwise. Das Gupta J., delivering the judgment of the Court, stated (at p. 909):
>
> All that the balance-sheet, as submitted, shows is that certain statements were made. The mere fact that the statements were made can never be taken as proving that the statements were correct.
>
> That is a distinction which the Courts of law have always been careful to make. Thus, if a person is to prove that he was ill on a particular date, the mere filing of a certificate of a medical man that he was ill on that date is not accepted as evidence to show that he was ill. The correctness of the statement made in the certificate has to be proved by an affidavit or oral testimony in court by the Doctor concerned or by some other evidence. There is no reason why an exception should be made in the case of balance sheets prepared by Companies for themselves. It has to be borne in mind that in many

> cases the Directors of the Companies may feel inclined to make incorrect statements in these balance-sheets for ulterior purposes. While that is no reason to suspect every statement made in these balance-sheets, the position is clear that we cannot presume the statements made therein to be always correct. The burden is on the party who asserts a statement to be correct to prove the same by relevant and acceptable evidence.
>
> Likewise, in the instant case, the summary of accounts does not prove the facts and particulars stated therein. The mere fact that the summary of the particulars were made could never be taken as proving that the contents were correct. It has to be proved by calling the maker to explain the facts and basis of the calculation of the amount claimed....

Clearly from the passage just quoted, the defendants have to prove the truth of the statement (in the letter) that illegal massage activities were carried on in the premises and this has not been done. In any event the letter is far from clear as to the place, whether it was in the rooms of the hotel or in the premises, where the illegal massage activities were alleged to have been carried out. Therefore, even assuming what the letter says is the truth and even assuming, as Miss Peggy Liow argued and which I disagreed, that the burden of proving that the plaintiff had committed a statutory offence (that of carrying out illegal massage activities) is simply on a balance of probabilities, the just referred to evidence fell woefully short of that standard; even more so when there is evidence to say that room service massage was carried out and the letter may be construed as being directed at the room service massage which activity is not relied on by the defendants for eviction of the plaintiff. The plaintiff had established his case on a balance of probabilities because the facts and circumstances of this case justify the inference that the plaintiff had suffered loss. As regards the standard of proof, I am of the view that though the ordinary standard of proof on a balance of probabilities applies the degree of probability must be higher if the allegation is serious (see *Hornal v. Newberger Products Ltd.* [1956] 3 All ER 970; *Eastern Enterprises Ltd. v. Ong Choo Kim* [1969] 1 MLJ 236). Allegation that an offence under the Kota Kinabalu Municipal Council (Massage Establishments) By-laws 1979, had been committed requires proof of a much higher degree of probability than, say, that of negligence. I will turn now to the question of how much damages should the plaintiff be awarded.

There is no evidence, as was said earlier, as to the damages suffered. Mr. Norbert Chin made a vain attempt to ask the Court to take note that a barber chair costs RM12,000 a piece to which I would say it is not a notorious fact which the Court can take judicial notice. Outside of the hairdressing trade, no one knows the price of a barber chair and it cannot therefore be said that it is a well known fact that a barber chair costs RM12,000. Then again, there was no evidence that any barber chair was lost as a result of the breach of the agreement that the plaintiff had suffered a loss could, as said earlier, justifiably be inferred by the sudden disruption to his business resulting from the unlawful re-entry by the defendants to the premises. Nominal damages may be awarded where the fact of a loss is shown but the necesary evidence as to its amount is not given which is the case here (see **McGregor on Damages**, 15th Edn., at para. 399). I therefore award the plaintiff damages of one ringgit. But the one ringgit, apart from vindicating the plaintiff's right, is also of sufficient strength to serve, to borrow the words of Maule J. in *Beaumont v. Greathead* [1846] 2 CB 494, as a mere peg on which to hang costs which I award to the plaintiff. The defendants' counterclaim is dismissed also with costs to the plaintiff.